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18 PIZZA HUT, INC., 30TH CENTURY MASTERS  
19 LLC, THE MARTIN AGENCY, INC. and THE  
20 INTERPUBLIC GROUP OF COMPANIES, INC.

13  
14 UNITED STATES DISTRICT COURT  
15  
16 CENTRAL DISTRICT OF CALIFORNIA

17 DANIEL AUERBACH and PATRICK  
18 CARNEY (collectively and professionally  
19 known as "THE BLACK KEYS"); THE  
20 BLACK KEYS PARTNERSHIP d/b/a  
MCMOORE MCLEST PUBLISHING;  
and BRIAN BURTON p/k/a DANGER  
MOUSE individually and d/b/a SWEET  
SCIENCE,

21 Plaintiff,

22 vs.

23 PIZZA HUT, INC., a Delaware  
24 corporation; 30TH CENTURY  
25 MASTERS LLC, a Virginia limited  
liability company; THE MARTIN  
26 AGENCY, INC., a Virginia corporation;  
THE INTERPUBLIC GROUP OF  
27 COMPANIES, INC., a Delaware  
corporation; and DOES 1 - 10, inclusive,

28 Defendant.

} Case No. CV12-05385 ODW (JCx)

} ANSWER TO COMPLAINT

} DEMAND FOR JURY TRIAL

} Assigned to the Hon. Otis D. Wright II  
Crtrm. 11

} Action Filed: June 21, 2012

## **ANSWER TO PLAINTIFFS' COMPLAINT**

Defendants Pizza Hut, Inc. (“Pizza Hut”), 30th Century Masters LLC (“30th Century”), The Martin Agency, Inc. (“The Martin Agency”), and The Interpublic Group of Companies, Inc. (“Interpublic”) (collectively “Defendants”) hereby respond to the Complaint filed by plaintiffs Daniel Auerbach and Patrick Carney (collectively, “The Black Keys”), the Black Keys Partnership d/b/a McMoore McLesst Publishing, and Brian Burton p/k/a Danger Mouse individually and d/b/a Sweet Science (“Danger Mouse”) (collectively, “Plaintiffs”) as follows. Unless specifically admitted, all allegations in the Complaint are denied:

## PRELIMINARY STATEMENT

1. To the extent the allegations set forth in paragraph 1 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Defendants deny each and every allegation thereof.

2. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the Complaint, except admit that the band known as "The Black Keys" produced an album entitled "El Camino", and that Brian Burton was named "Producer of the Year" at the Grammy Awards in 2011.

3. To the extent the allegations set forth in paragraph 3 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Defendants deny each and every allegation thereof, except admit that the Martin Agency created a commercial advertisement for "Cheesy Bites Pizza."

4. To the extent the allegations set forth in paragraph 4 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to

1 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
2 Defendants deny each and every allegation thereof.  
3

4 **JURISDICTION AND VENUE**

5 5. To the extent the allegations set forth in paragraph 5 of the Complaint  
6 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
7 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
8 Defendants deny each and every allegation thereof, except admit that Plaintiffs  
9 purport to bring an action under the cited statute and seek the relief claimed.

10 6. To the extent the allegations set forth in paragraph 6 of the Complaint  
11 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
12 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
13 Defendants deny each and every allegation thereof, except admit that the Court has  
14 subject matter jurisdiction pursuant to the cited statutory sections.

15 7. To the extent the allegations set forth in paragraph 7 of the Complaint  
16 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
17 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
18 Defendants deny each and every allegation thereof, except admit that defendants  
19 Interpublic, Pizza Hut and The Martin Agency are subject to personal jurisdiction in  
20 this judicial district for this case. Defendant 30th Century further specifically denies  
21 this Court has personal jurisdiction over it.

22 8. To the extent the allegations set forth in paragraph 8 of the Complaint  
23 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
24 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
25 admit that venue is proper in this judicial district.

## THE PARTIES

9. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the Complaint.

10. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 10 of the Complaint.

11. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the Complaint.

12. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint.

13. In response to the allegations set forth in paragraph 13 of the Complaint, defendant Pizza Hut admits those allegations. The remaining defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

14. In response to the allegations set forth in paragraph 14 of the Complaint, defendant 30th Century admits those allegations. The remaining defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

15. In response to the allegations set forth in paragraph 15 of the Complaint, defendant The Martin Agency admits those allegations. The remaining defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

16. In response to the allegations set forth in paragraph 16 of the Complaint, defendant Interpublic admits those allegations. The remaining defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

17. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of the Complaint.

18. To the extent the allegations set forth in paragraph 18 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Defendants deny each and every allegation thereof.

## **GENERAL AVERMENTS**

19. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 19 of the Complaint.

20. In response to the allegations set forth in paragraph 20 of the Complaint, Defendants deny knowledge or information sufficient to form a belief as to the truth of those allegations, except to admit that Exhibit A to the Complaint appears to be a copy of an application for copyright registration for a work entitled "El Camino," with a list of titles that includes "Gold On The Ceiling."

21. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 21 of the Complaint.

22. To the extent the allegations set forth in paragraph 22 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Defendants deny each and every allegation thereof.

23. To the extent the allegations set forth in paragraph 23 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, Defendants deny each and every allegation thereof, except admit they do not have any license, authorization, permission or consent to use the song entitled "Gold On The Ceiling."

24. To the extent the allegations set forth in paragraph 24 of the Complaint are deemed to be allegations of law, Defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact,

1 Defendants deny each and every allegation thereof, except defendant Pizza Hut  
2 admits that it received a cease and desist letter signed by Cory Shackelford, Counsel,  
3 Legal Affairs for Wixen Music Publishing, Inc., dated May 30, 2012 and refers to  
4 that letter for a true and complete recitation of the contents thereof.

5 **COUNT I**

6 **COPYRIGHT INFRINGEMENT**

7 **(17 U.S.C. §§ 106 AND 501)**

8 25. Defendants repeat and reallege their responses to paragraphs 1-24 of the  
9 Complaint with the same force and effect as if set forth fully herein.

10 26. To the extent the allegations set forth in paragraph 26 of the Complaint  
11 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
12 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
13 Defendants deny each and every allegation thereof.

14 27. To the extent the allegations set forth in paragraph 27 of the Complaint  
15 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
16 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
17 Defendants deny each and every allegation thereof.

18 28. To the extent the allegations set forth in paragraph 28 of the Complaint  
19 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
20 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
21 Defendants deny each and every allegation thereof.

22 29. To the extent the allegations set forth in paragraph 29 of the Complaint  
23 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
24 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
25 Defendants deny each and every allegation thereof.

26 30. To the extent the allegations set forth in paragraph 30 of the Complaint  
27 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
28

1 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
2 Defendants deny each and every allegation thereof.

3 31. To the extent the allegations set forth in paragraph 31 of the Complaint  
4 are deemed to be allegations of law, Defendants are not required to plead thereto; to  
5 the extent the allegations of the said paragraph are deemed to be allegations of fact,  
6 Defendants deny each and every allegation thereof.

7

8 **PLAINTIFFS' PRAYER FOR RELIEF**

9 Defendants deny that Plaintiffs are entitled to any relief requested in  
10 Paragraphs 1-6 of Plaintiffs' prayer for relief or any other relief whatsoever from  
11 Defendants.

12

13 **DEFENDANTS' DEFENSES**

14 Without conceding that any of the following necessarily must be pleaded as an  
15 affirmative defense or that any of the following is not already at issue by virtue of the  
16 foregoing responses to Plaintiffs' allegations, Defendants hereby assert the following  
17 defenses. Defendants reserve the right to add to or amend their defenses further as  
18 additional information is developed through discovery or otherwise.

19

20 **FIRST DEFENSE**

21 The Complaint fails to state a claim upon which relief can be granted.

22

23 **SECOND DEFENSE**

24 No works created or distributed by Defendants are substantially similar to any  
25 protectable elements of Plaintiffs' allegedly infringed work.

26

27 **THIRD DEFENSE**

28 Plaintiffs' claim is barred, in whole or in part, because any use by Defendants  
29 of the allegedly copyrighted work at issue or any portion thereof was lawful as fair  
use pursuant to 17 U.S.C. § 107.

## FOURTH DEFENSE

Plaintiffs' claim is barred, in whole or in part, because any use by Defendants of the allegedly copyrighted work was *de minimis*.

## **FIFTH DEFENSE**

Plaintiff Danger Mouse does not have standing to assert a copyright claim to the extent that he claims “performance rights” in the copyrighted material.

## SIXTH DEFENSE

Plaintiffs have failed to allege with sufficient specificity which portions of the allegedly copyrighted work were allegedly infringed.

## **SEVENTH DEFENSE**

Even if there was any similarity between Plaintiffs' allegedly infringed work and the work used in the "Cheesy Bites Pizza" commercial advertisement, such similarity consists solely of material that is not original to Plaintiffs and is therefore not protectable expression.

## **EIGHTH DEFENSE**

Even if there was any similarity between Plaintiffs' allegedly infringed work and the work used in the "Cheesy Bites Pizza" commercial advertisement, such similarity consists solely of unprotectable ideas, stock elements, and/or scenes a faire, and is therefore not protectable expression.

## NINTH DEFENSE

Even if there was any similarity between protectable elements of Plaintiffs' allegedly infringed work and the work used in the "Cheesy Bites Pizza" commercial advertisement, Defendants did not copy or unlawfully appropriate any part of Plaintiffs' work, including any protectable elements thereof.

## TENTH DEFENSE

Plaintiffs' claim is barred, in whole or in part, by the doctrine of independent creation.

## **ELEVENTH DEFENSE**

Plaintiffs' claim is barred by the equitable doctrines of laches, waiver, estoppel, acquiescence and/or unclean hands.

## **TWELFTH DEFENSE**

If Defendants made any use of Plaintiffs' work, such use was made with innocent intent and Defendants' actions were not willful.

## **THIRTEENTH DEFENSE**

Plaintiffs' claim is barred, in whole or in part, due to Plaintiffs' failure to reasonably mitigate its damages, if any.

## **FOURTEENTH DEFENSE**

Plaintiffs have not suffered any actual damages and any damages alleged are too speculative and imprecise.

## **FIFTEENTH DEFENSE**

Plaintiffs are not entitled to injunctive relief because any alleged injury to Plaintiffs is not immediate and irreparable, and Plaintiffs have an adequate remedy at law.

## SIXTEENTH DEFENSE

The Complaint is barred, in whole or in part, because any damages allegedly suffered by Plaintiffs were either wholly or in part the legal fault of other persons, firms, corporations, or entities, and that legal fault reduces the percentage of responsibility, if any, which is to be borne by each of the Defendants.

## SEVENTEENTH DEFENSE

Plaintiffs have no entitlement to statutory damages or attorneys' fees under the Copyright Act.

## **EIGHTEENTH DEFENSE**

The Court does not have personal jurisdiction over Defendant 30th Century.

## NINETEENTH DEFENSE

Defendants reserve all affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the Copyright Laws and the United States and any other defenses, at law or in equity, that may now exist or in the future be available based on discovery and, further factual investigation in this case.

## DEFENDANTS' PRAYER FOR RELIEF

WHEREFORE, Defendants demand that judgment be entered against Plaintiffs as follows:

1. That Plaintiffs take nothing by their Complaint on file herein;
2. That Plaintiffs claim be dismissed with prejudice;
3. That Defendants be awarded their costs of suit, prejudgment interest and attorneys' fees pursuant to 17 U.S.C. § 505; and
4. That Defendants be awarded such other and further relief as the Court may deem proper.

DATED: August 16, 2012

DAVIS WRIGHT TREMAINE LLP  
SEAN M. SULLIVAN  
MARCIA B. PAUL

By: /s/ Sean M. Sullivan

Sean M. Sullivan

Attorneys for Defendants  
PIZZA HUT, INC., 30TH CENTURY  
MASTERS LLC, THE MARTIN  
AGENCY, INC. and THE  
INTERPUBLIC GROUP OF  
COMPANIES, INC.

**JURY DEMAND**

For all jury-triable issues, Defendants hereby request a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

DATED: August 16, 2012

DAVIS WRIGHT TREMAINE LLP  
SEAN M. SULLIVAN  
MARCIA B. PAUL

By: /s/ Sean M. Sullivan

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